

INFORMATION SHEET
 DETERMINATIONS OF NO JURISDICTION FOR ISOLATED, NON-NAVIGABLE, INTRA-STATE WATERS RESULTING
 FROM U.S. SUPREME COURT DECISION IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY
 V. U.S. ARMY CORPS OF ENGINEERS

DISTRICT OFFICE: Philadelphia

FILE NUMBER: CENAP-OP-R-200500695

REGULATORY PROJECT MANAGER: Kevin W. Dougherty Date: May 29, 2006

PROJECT REVIEW/DETERMINATION COMPLETED: In the office N (Y/N) Date:
 At the project site Y (Y/N) Date: January 10, 2006

PROJECT LOCATION INFORMATION:

State: Pennsylvania

County: Berks

Center coordinates of site by latitude & longitudinal coordinates: 40-20-24.42 N; 76-04-54.38 W

Approximate size of site/property (including uplands & in acres): 79.832

Name of waterway or watershed: Spring Creek (Schuylkill River)

SITE CONDITIONS:

Type of aquatic resource ¹	0-1 ac	1-3 ac	3-5 ac	5-10 ac	10-25 ac	25-50 ac	> 50 ac	Linear feet	Unknown
Lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
River	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stream	0.106 ac	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dry Wash	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mudflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sandflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wetlands	0.006 ac	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Slough	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prairie pothole	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wet meadow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Playa lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vernal pool	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Natural pond	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other water (identify type)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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¹Check appropriate boxes that best describe type of isolated, non-navigable, intra-state water present and best estimate for size of non-jurisdictional aquatic resource area.

Migratory Bird Rule Factors ¹ :	If Known		If Unknown Use Best Professional Judgment		
	Yes	No	Predicted to Occur	Not Expected to Occur	Not Able To Make Determination
Is or would be used as habitat for birds protected by Migratory Bird Treaties?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat by other migratory birds that cross state lines?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat for endangered species?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is used to irrigate crops sold in interstate commerce?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹Check appropriate boxes that best describe potential for applicability of the Migratory Bird Rule to apply to onsite, non-jurisdictional, isolated, non-navigable, intra-state aquatic resource area.

TYPE OF DETERMINATION: Preliminary ☐ Or Approved ☒ .

ADDITIONAL INFORMATION SUPPORTING NJD (e.g., paragraph 1 – site conditions; paragraphs 2-3 – rationale used to determine NJD, including information reviewed to assess potential navigation or interstate commerce connections; and paragraph 4 – site information on waters of the U.S. occurring onsite):

1. SITE CONDITIONS

a. The property consists of a mixture of active agricultural fields (corn) and woodlots underlain by well drained (Weikert) and moderately well drained (Berks) soils. There is a single residential complex consisting of a single-family residence and outbuildings located in the northeastern corner of the property. Surrounding land use is rural residential and medium density residential. Review of the aerial photography (1964) in the Soil Survey for Berks County Pennsylvania (1970) shows that land use on the tract is, with the exception of the construction of the residence, essentially unchanged from then to the present. However, lands adjacent to the tract to the south have been converted from agricultural to residential use. The 1964 photography as annotated in the Soil Survey identified a perennial stream arising from near the middle of the tract and flowing south, off the property, and discharging into an unnamed tributary to Spring Creek approximately 1000 feet south of the property. Recent aerial photography (2004) supplemented by field inspection shows that the portion of the stream in the development (south of Ruth Avenue) has been diverted and the channel filled. The portion of the stream north of Ruth Avenue (on-site) is dry and no longer has a distinct channel for a distance of some 300 feet north of the roadway. From the headwaters, the stream has at least intermittent flow for approximately 540 feet until dissipating into sheet flow as previously described, some 300 feet north of Ruth Avenue. Based on the recent field inspection, it appears that either the original classification was in error or that changes in surrounding land use have altered the local groundwater table. The stream now has a losing section approximately 540 feet downstream from the headwaters and flow during normal conditions is lost to a subsurface water table. Construction of the subdivision to the south may be responsible for alteration of the local hydrology.

b. Topographically the property consists of a series of rolling hills. A narrow wooded north-south oriented valley lies nearly in the middle of the site. A small ephemeral or intermittent stream begins in a series of seeps and flows south within a small but well defined channel with a discrete ordinary high water (OHW) line. As noted above, this channel dissipates into sheet flow approximately 300 feet north of Ruth Avenue (the southern tract boundary). A second small valley begins near the northeastern corner of the site and contains a small intermittent stream that arises at the head of the valley and flows north, discharging into an unnamed tributary of Spring Creek.

c. Three areas are identified on the site as wetlands according to the criteria of the 1987 Corps of Engineers Wetland Delineation Manual. Two of these areas are waters of the United States as they are wetlands contiguous with the small intermittent stream located near the northeastern corner of the site. This stream is part of the surface tributary system of a water of the United States. One 0.006 acre area of forested wetland fringing a seep adjacent to the ephemeral channel in the central portion of the site is isolated and is without a nexus to interstate or foreign commerce and therefore is not a water of the United States.

2. RATIONALE FOR DETERMINATION

a. The excluded area includes an ephemeral or intermittent stream that begins in a series of seeps, flows south for approximately 540 feet but then dissipates into sheet flow. As shown on the 1964 aerial photography, this stream was identified as perennial and extended south approximately 1300 feet to discharge into an unnamed tributary of Spring Creek. During the interval between 1964 and the present the area south of Ruth Avenue has been developed as a residential subdivision. The lower segment of the stream shown on the 1964 photography has been piped or otherwise diverted. As the on-site section of the stream dissipates into sheet flow, it is not part of the surface tributary system of a water of the United States and therefore it is an isolated intrastate water. The stream is not more than 2 feet wide and 3 inches deep in any section. Due to the small size, the stream will not support any type of vessel and therefore it is not navigable in fact (33 CFR 328.3(a)(1)). The small size of the stream and the lack of any unusual properties make it unlikely that the stream could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The stream is ephemeral or intermittent and does not support either fish or shellfish that could be taken and sold in interstate or foreign commerce (33 CFR 328.3(a)(3)(iii)). The stream contains insufficient water for use either to irrigate crops or for use in industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). The stream contains neither known mineral deposits nor sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). As such, the stream is an isolated non-navigable intrastate water with no significant nexus to interstate or foreign commerce and therefore is not within the jurisdiction of Section 404 of the CWA.

b. The excluded area also includes a small (0.006 acre) emergent/shrub-scrub seep that is contiguous with the stream discussed above. The seep forms one of the headwater sources for the small stream. The closest water that is part of the surface tributary system of a water of the United States is the unnamed tributary to Spring Creek, located approximately 1500 feet to the south. This distance is too far to consider this wetland to be neighboring to the unnamed tributary to Spring Creek. As the wetland is neither contiguous with, neighboring to, or bordering a water of the United States, it is not an adjacent wetland pursuant to 33 CFR 328.3(c). It is therefore an isolated intrastate wetland and to determine if jurisdiction could be asserted the following factors were considered:

1. As the area has no permanent standing water, it could not support for any type of vessel. The area is therefore not navigable in fact.

2. The small size of the wetland and the lack of any unusual properties make it unlikely that the wetland could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The wetland supports neither fish nor shellfish and water from it could be used neither to irrigate crops nor for industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). The wetland does not contain merchantable timber, there are no known mineral deposits, and the area does not contain sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)).

c. Based upon the factors considered above, the wetland is an isolated, intrastate wetland with no nexus to interstate or foreign commerce. As such, pursuant to 33 CFR 328.3, it is not a water of the United States, and is not subject to Section 404 of the CWA.

3. WATERS OF THE UNITED STATES

a. Three areas were identified on the site that either contained channels with Ordinary High Water (OHW) lines or met the 1987 Corps Manual criteria for identification as wetlands. These areas included: 1) an intermittent stream located in the northeastern corner of the property and identified by flags D1-D8 and C1-C2, C5-C7 and C-9 to property line; 2) two small fringing wetlands contiguous with the intermittent channel (identified by flags C2-C5 and C7-C9). The intermittent channel is tributary to Spring Creek which is part of the Schuylkill River drainage. The

Schuylkill River is tributary to the Delaware River, an interstate navigable water of the United States pursuant to 33 CFR 328.3(a)(1) and 33 CFR 329.4. Thus, the unnamed tributary on the site is part of the surface tributary system of a water of the United States and is therefore a water of the United States pursuant to 33 CFR 328.3(a)(5). The wetlands contiguous with this tributary are therefore wetlands adjacent to a water of the United States (33 CFR 328.3(c)). Adjacent wetlands are waters of the United States pursuant to 33 CFR 328.3(a)(7).

Enclosure 2